

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE)	
)	CRIMINAL ACTION NUMBERS
v.)	
)	IN-11-04-2193 and IN-11-04-1098
CARL RHOADES)	
)	ID No. 1104000167
Defendant.)	

Submitted: October 3, 2011
Decided: November 3, 2011

MEMORANDUM OPINION

Upon Motion of Defendant to Suppress - GRANTED

Diana P. Abboud, Esquire, Deputy Attorney General, Department of Justice, Attorney for the State of Delaware

Beth D. Savitz, Esquire, of Wilmington, Delaware, Attorney for the Defendant Carl Rhoades

HERLIHY, Judge

Defendant Carl Rhoades moves to suppress evidence seized from his residence pursuant to a search warrant. He claims the warrant lacks probable cause. The Court concurs and grants his motion to suppress.

Since the sole issue in this case revolves around the sufficiency of the affidavit of probable cause, the pertinent portions are quoted:

1. Your affiant #1, Officer Sung Choi #1027 is a sworn police officer with the Middletown Police Department and has been since January 1, 2009. Your affiant #1 is currently assigned to uniform patrol. Your affiant #1 has received training in narcotics and non-narcotics investigations from the New Castle County Police Academy. Your affiant #1 has also received additional narcotics investigation training with the Delaware State Police Department. Your affiant #1, has made numerous drug related arrests employed as a police Officer.
2. Your affiant #2, Officer Jason Bauer #1031 is a sworn police officer with the Middletown Police Department and has been since March 12, 2007. Your affiant #2 is currently assigned to uniform patrol. Your affiant #2 has received training narcotics and non-narcotics investigations from the Delaware State Police Academy. Your affiant #2 has also received additional narcotics investigation training with the Dover Police Department Drug and Vice Unit. Your affiant #2, has made numerous drug related arrests, authored and executed numerous search warrants while employed as a police officer.
3. During the month of February, your affiant #2 received information from a confidential source (hereinafter referred to as CS) the subject "Buck" was dealing narcotics throughout the town of Middletown and from the residence of 16 W. Lake Street. The subject only known as "Buck" was later identified by Det. Hoffecker and Officer Davis of the Middletown Police Department as Carl. R. Rhoades BM DOB 7/26/1988. A DELJIS check confirmed Carl R. Rhoades BM DOB 7/26/1988 resides at 16 W. Lake Street, Middletown DE 19709 in the town of Middletown, County of New Castle in the State of Delaware.

4. On or about the week of March 21, 2011 through March 27, 2011, your affiant #1 and your affiant #2 drove to 16 W. Lake Street Middletown DE 19709 in reference to collecting trash at that residence for suspected drug activity. Upon our arrival both officers observed a trash can with white trash bags placed around it, that was placed at the edge of the street in front of the residence of 16 W. Lake Street. It should be noted that this was on a normal scheduled trash collection day. Both officers secured the trash within, which was then transported back to Middletown Police Headquarters.
5. Once at Middletown Police Department both officers examined the contents of the trash. Both officers located a small yellow baggie with green leafy substance which tested positive for marijuana via NARK #8 field test kit. Officers also located empty clear glassine baggies with the corners ripped off which is indicative of sale and distribution of narcotics. Officers located a white pill with the imprint of 35 892 V on it, later to be identified as a 5 milligram Hydrocodone pill via a search through Drugs.com. Officers located mail that was addressed to Ophelia Evans at 16 West Lake Street Middletown DE 19709.
6. Your affiant #2 conducted a DELJIS inquiry which revealed Carl R. Rhoades does reside at 16 W. Lake Street Middletown DE 19709. It should be noted Carl R. Rhoades is on level 4 probation also known as home confinement. Carl R. Rhoades was also found to have a criminal history of an Assault First degree, Possession of a firearm during a commission of a Felony and also a Possession of a schedule II Non narcotic.¹

Discussion

Under the Delaware and United States Constitution, a judicial officer may only issue a search warrant upon a showing of probable cause.² Within the “four corners” of the

¹ Affidavit of Probable Cause to search warrant dated March 29, 2011.

² U.S. CONST. amend. IV; DEL. CONST. art. I, § 6; *Fink v. State*, 817 A.2d 781, 786 (Del. 2003).

search warrant, the affidavit of probable cause must set forth sufficient facts to allow a judicial officer to form a reasonable belief that an offense has been committed and that seizable property would be found in a particular location.³ In determining whether probable cause exists the Court must look to the “totality of the circumstances” which means looking at such things as the reliability of the informant, the details in the informant’s tip and degree of corroboration by independent police surveillance and information.⁴ Great deference is paid to the issuing magistrate’s determination of probable cause.⁵

The probable cause affidavit is not complex and can be summarized:

1. The affiants have some training and experience with drug arrests and/or investigations.
2. Sometime in February - not otherwise specified - the affiants were told that (a person later identified as Rhoades) was “dealing narcotics throughout the town of Middletown and from (a residence later linked to Rhoades).”
3. During a March 21-27, 2011, the affiants collected trash from a trash can located at the curb in front of the defendant’s residence.
4. Inside the collected trash, the police found a small yellow baggie with marijuana (weight unspecified) and some empty torn baggies. Those baggies the officer stated are indicators of the distribution of narcotics. They also found one Hydrocodone pill.

³ *Sisson v. State*, 903 A.2d 288, 296 (Del. 2006).

⁴ *Legrande v. State*, 947 A.2d 1103, 1108 (Del. 2008).

⁵ *Jensen v. State*, 482 A.2d 105, 111 (Del. 1984).

5. Rhoades is on Level 4 Home Confinement (for what is not specified).
6. Rhoades has an arrest or conviction (not specified) for possession of a non-narcotic drug (date not specified).

First, the warrantless seizure of the trash from the street was not unconstitutional.⁶

Second, however, the probable cause starts to dissipate when the “confidential source’s” status and information is examined. It is not a requirement that a confidential source always be a past, proven reliable informant (whose information has led to arrests/convictions of others).⁷

But when there is no basis for the issuing magistrate to determine the reliability of the informant, necessarily, corroborative information/investigation becomes more of a premium.⁸ Further, there is no indication how the confidential source came by his or her information. The information is rather general - selling throughout Middletown and from a residence.

Therefore, because of the broad nature of the confidential source’s “tip,” and from a source for whom the police did not vouch, the police were compelled to undertake a more exhaustive investigation to corroborate it. At least, three weeks after the February tip, the police searched Rhoades’ trash. During the search of the trash, the officers found

⁶ *State v. Ranken*, 25 A.3d 845 (Del. Super. 2010), *aff’d Ranken v. State*, 21 A.3d 597 (Del. 2011)(TABLE).

⁷ *See Tatman v. State*, 494 A.2d 1249, 1251 (Del. 1985).

⁸ *See McAllister v. State*, 807 A.2d 1119, 1124 (Del. 2002).

some marijuana, a few torn baggies and one hydrocodone pill. These items were the only corroboration, if one can call it that, of the source's tip. Despite the officer's opinion that the small baggies were indicative of drug dealing (how is not specified) the Court finds the only "corroboration" of drug dealing to be inadequate.

The Court is required to confine its analysis to what is in the affidavit, it is inappropriate to note the absence of many other corroborative investigative steps the police may have or perhaps should have undertaken. To be clear, the Court's finding that the affidavit of probable cause is insufficient is confined to the contents of the affidavit.

The Court must note either a disconnect or misuse of terms, even though this again, played no role in the Court's finding of insufficient information for probable cause. The affiants say that the source said Rhoades "was dealing narcotics." The police recovered only one narcotic drug, one Hydrocodone pill. Marijuana is not a narcotic drug. Yet the affiants say that the torn baggies are indicative of "narcotics" distribution. The police should know better than to make such mistakes in affidavits, even if "merely" semantical.⁹

The Court must finally state one other matter. The police are to be commended for getting a search warrant. They acted, the Court finds, in good faith. Regrettably, in *Dorsey v. State*, the Supreme Court held that the federal "good faith" exception to the

⁹ Arguably the informant's tip regarding selling "narcotics" and only finding that one narcotic pill and marijuana further undercuts the affidavit. But the Court is not making that finding.

United States Constitution does not apply to the Delaware Constitution.¹⁰ This Court has respectfully disagreed with that holding and the reasons are set forth in *State v. Henderson*.¹¹ This case is another example why this Court still strongly stands behind its reasoning in *Henderson*.

Conclusion

For the reasons stated herein, Defendant Carl Rhoades' motion to suppress is **GRANTED.**

IT IS SO ORDERED.

J.

¹⁰ 761 A.2d 807, 818-19 (Del. 2000).

¹¹ 906 A.2d 232 (Del. Super. 2005).